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SUPERIOR RIGHT OF PARENT TO CUSTODY OF MINOR CHILD.

Our position on the question of the superior right of a father to the custody of his minor child is well known. We gave ourselves free rein not such a long while ago in denouncing the action of a nisi pruis court in refusing to give a child to its father where it was not shown that he was incompetent to care for it. 65 Cent. L. J. 175.

We attempted to show in that editorial that the "best interest of the child" rule was being prostituted by directing its application to circumstances where it was never intended it should operate, and was subverting the rightful authority of the father.

Now comes the case of Peese v. Gellerman, 110 S. W. Rep. 196, in which the Court of Civil Appeal of Texas deprives a father of his right to his little daughter whom he had turned over to her maternal aunt after her mother's death and whom he desired to reclaim upon his second marriage.

The father was shown to be a good man, well fixed in this world's goods and of a good, loving disposition. But the maternal relatives in resisting the father's claim were permitted to drag out of the closet of the second wife an old skeleton which in effect showed she had once been seduced by an ardent lover several years before her marriage when she was but seventeen years of age, and that the child of this unfortunate union was still living with its mother. The court deliberately refused to follow the great Missouri case of In re Scarritt, 76 Mo. 565, which is the most wonderfully clear declaration of the father's superior right to his minor child ever enunciated by any court in this country, and permits this testimony as to certain previous wrongful acts by the second wife to deprive a father of the child of his being and the child of that natural love and affection which it can receive from no other source. The court plays so loosely on the heartstrings of parental affection that we are inclined to believe that the writer of this opinion has probably never experienced those deep emotions that draw a father's heart to his child. Courts are trifling with a very serious matter when they thus carelessly ignore the father's right to and authority over his children, a right and authority which existed in the days of the Patriarchs long before the existence of the state. It is upon the similitude of the parental relation that the state derives much of its own authority as *parens patriae* and when its courts strike down the superior rights of the fathers of the land over the persons of their own children, they have laid the axe at the root of the tree from which all proper governmental authority proceeds.

We are not unmindful of the fact that the Texas court has a considerable array of authority which it may cite to support it in its assumption of a right to consider the opportunities and prospects of the child alone, leaving out of consideration any *superior right* in the father. If the courts are going to put in the balances as against the father's *paramount* right to the custody of the child, the desires of some rich relative to keep the child and to furnish her with a better home than the father can provide, the seeds of rebellion have been sown in the very nature of our being against a government which will tear our offspring from our arms and give them to another, because, forsooth, such other is better able to care for it. The courts and judges who have been guilty of setting up such standards had better spend some time in studying carefully the great opinion of the Missouri Supreme Court in In re Scarritt, supra.

In the principal case it is refreshing to observe that one member of the court appreciated the importance of the father's superior right to his child. Judge Neill, dissenting from the harsh opinion of the majority of the court, says: "I believe that under the law and facts in this case the appellant has the right to take his little daughter home and treat her as a member of his family. I think he has this right, because the God of nature has given it to enable him to discharge the duty he owes as a father to his child. Where a right emanates from such a source, the one to whom it is given, if fit to perform the duty it imposes, cannot be rightfully deprived of it by the courts of any country. The law itself recognizes the right primarily of the parent to the custody of his minor child, and but re-echoes the voice of nature in the duty it imposes. The mother of the child being dead, the presumption is that its father has the right to its custody; and it devolves upon the party claiming adversely to it to show that it has been forfeited by him, that is, it must be proved the father is not a fit person to rear and nurture his own child."

NOTES OF IMPORTANT DECISIONS

TRIAL AND PROCEDURE—WHEN PARTY ERRONEOUSLY ASSUMES THE BURDEN OF PROOF.—In Burgraf v. Byrnes (Minn.), 116 N. W. Rep. 838, it is held that where a party erroneously assumes the burden of proof as to a particular fact, the mistake will not be corrected in the appellate court. The action was one to recover damages for the unauthorized compromise of a judgment. The defense seems to have been that the judgment was comparatively worthless. In the trial plaintiff assumed the burden of proof as to the value of the judgment and undertook to prove that it was worth face value. Verdict and judgment for defendant. Plaintiff assigned as error the refusal "of the court to direct a verdict for the full amount of damages, as measured by the judgment and interest, on the ground that the presumption is that the judgment is worth its face value." This is held not to have been erroneous, "* * * for the plaintiff assumed that burden and undertook to show the actual value of the judgment. Plaintiff, instead of electing to stand on the theory on which he now bases error in the rulings of the court, introduced affirmative evidence by which the actual value of the judgment was sought to be shown. Having elected so to do, he is in no position to complain of the acceptance by that court of his position. He is within the rule that 'where a party erroneously assumes the burden of proof as to a particular allegation, or the burden of evidence as to a particular fact, that mistake will not be corrected in the appellate court,'" citing 16 Cyc. 26 (B); 2 Cyc. 675 (IX); Geiser Mfg. Co. v. Yost, 90 Minn. 47, 95 N. W. Rep. 584; Earl Fruit Co. v. Thurston Co., 60 Minn. 351, 62 N. W. Rep. 439; Benjamin v. Shea, 83 Iowa, 392, 49 N. W. Rep. 989. And see Denton v. C., R. I. & P. Ry. Co., 52 Iowa, 161, 2 N. W. Rep. 1093, 35 Am. Rep. 263; Stewart v. Outhwaite, 141 Mo. 562, 44 S. W. Rep. 326. "Where parties consent to try their case upon a certain theory of what the law is, though it be erroneous, they cannot complain at the result, if it be correct according to that theory." Davis v. Jacoby, 54 Minn. 144, 55 N. W. Rep. 908. And see 66 C. L. J. 291. There is excellent authority for the proposition that where a case is tried on one theory, it cannot be presented in the appellate court on another theory. In other words, having fixed on a theory, one must stand or fall on that theory.

EVIDENCE — TELEPHONIC COMMUNICATIONS.—As science and civilization advances the law attempts to follow, if not as promptly as it should, at least not a great ways off. The case of Knickerbocker Ice Co. v. Gardiner Dairy Co., 69 Atl. Rep. 405, discusses the admissibility and effect of telephonic communications as evidence.

In that case the evidence of Mr. Wilbourn, superintendent of the Gardiner Company, in reference to a telephone conversation with the Knickerbocker Company, was admitted, subject to exception. He called up the company and inquired who was there, and the party at the phone said the Knickerbocker Ice Company. He did not recognize the voice of the person talking. The man at the phone stated the price of the ice, said they had plenty of it, and would let the plaintiff have it provided it gave them all its trade. The plaintiff got five or six loads that day (June 29th), and all the orders were by telephone. He had his talks with the same person, and in each case he got all the ice he ordered. One of defendant's exceptions was to the refusal to strike out that evidence.

The trial court admitted the evidence and the appellate court after reviewing the authorities upheld the action of the trial court, saying: "As it is a character of evidence that

might be used improperly, courts should be careful in the application of the rule. In this case, however, we have no difficulty in sustaining the rulings of the lower court.

The authorities amply sustain the decision in this case. In Murphy v. Jack, 142 N. Y. 215, 36 N. E. Rep. 882, 40 Am. St. Rep. 590, which was an application to vacate an attachment which had been issued on an affidavit made on information over the telephone, the court said: 'There would be no objection to the information having been conveyed through the medium of the telephone, if it had been made to appear that the affiant was acquainted with the plaintiff and recognized his voice; or if it had appeared, in some satisfactory way, that he knew it was the plaintiff who was speaking with him.' In Wolfe v. Mo. Pac. R. Co., 97 Mo. 473, 11 S. W. Rep. 49, 3 L. R. A. 539, 10 Am. St. Rep. 331, it was held that a conversation by telephone between a witness and another person in the private office of a party is not inadmissible because the witness does not identify the voice of the other person as that of the party or his clerk. Barclay, J., said: 'When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in relation to his business through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business therein carried on.' See, also, Mo. Pac. Ry. Co. v. Heidenheimer, 82 Tex. 201, 17 S. W. Rep. 608, 27 Am. St. Rep. 861; Gen. Hospital Soc. v. N. H. Rendering Co., 79 Conn. 581, 65 Atl. Rep. 1065; Kan. City Star Co .v. Standard Warehouse Co., 123 Mo. App. 13, 99 S. W. Rep. 765; Godair v. Ham. Nat. Bank, 225 Ill. 572, 80 N. E. Rep. 407, 116 Am. St. Rep. 172; Jones on Ev., sec. 210; Wigmore on Ev., sec. 2155. The latter says: 'No one has ever contended that, if the person first calling up is the very one to be identified, his mere purporting to be A. is sufficient, any more than the mere purporting signature of A. to a letter would be sufficient. Ante, sec. 2148. The only case practically presented therefore is that of B.'s calling up A. and being answered by a person purporting to be A. There is much to be said for the circumstantial trustworthiness of mercantile custom (Ante, sec. 95) by which, in average experience, the numbers in the telephone directory do correspond to the stated names and addresses, and the operators do call up the correct number, and the person called does in fact answer. These circumstances suffice for some reliance in mercantile affairs; and it would seem safe enough to treat them in law as at least sufficient evidence to go to the jury, just as testimony based on prices current is received. Ante, sec. 719. This view has received some judicial support.' The author then goes on to consider the case where the antiphonal speaker does not purport to be a particular person, but merely some member of the office staff authorized to make a contract or an admission, and added: 'On the principle above suggested (though not with the same force) mercantile experience may well suffice, by which customarily the person who is in fact summoned to the telephone and proceeds to conduct the negotiation is prima facie a person authorized to do so, precisely as a person receiving money at the cashier's desk is presumably authorized to do so. Upon this point there is little judicial inclination to take the liberal view.' "

THE EFFECT UPON THE EXERCISE OF THE RIGHT OF EMINENT DOMAIN OF THE INTERMINGLING OF A PRIVATE WITH A PUBLIC USE.

It is a fundamental principle of law that property cannot be taken by the exercise of eminent domain except for some public use. As to what is meant by the term "public use" there is considerable conflict among the authorities. On the one hand it is held that the public must have an absolute right to a certain definite use of the private property on terms and for charges fixed by law, and that the owner must be compelled by law to permit the general public to enjoy it.[1]

Other cases hold that the term public use is synonymous with public benefit or advantage, and that it is not essential that the entire community or even any considerable portion of it should directly enjoy or participate in the improvement in order to make the use a public one. Some cases even hold that the convenience of the public justifies the exercise of the right.[2] This latter doctrine has been employed to justify the exercise of the right in connection with the milldam and drainage statutes of certain states. These statutes have been regarded by many of our courts as the out-growth

(1) Pittsburg R. Co. v. Benwood Iron Works, 31 W. Va. 710.

(2) Omstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221; Pittsburg v. Scott, 1 Pa. St. 309.

of necessity, unjustifiable on principle. "The Milldam acts originated in New England at a time when transportation facilities were poor and the public gristmill to which the people might resort was not only a great public benefit but also a public necessity. The early authorities sustained the acts upon the ground of the incidental public benefit resulting to the community from such mills."[3]

As was stated in the last case cited, "It is probably impossible to reconcile all the authorities, and to make them entirely consistent with any definition of a public use. With the exception of a certain line of cases which have grown out of peculiar conditions and apparent necessity, the authorities consistently recognize the fact that a public use means a use by the public. The question of the general public benefit is necessarily also involved, but the two do not always exist together."

The question whether a certain use is public or private is a judicial and not a legislative one. It is the sole function of the legislature to decide the question *when* the power of eminent domain may be exercised in the promotion of some public use.

The question often arises as to the effect upon the exercise of the right of the intermingling of a private with a public use. In a number of instances state legislatures have enacted statutes, the purpose of which was to legalize a taking in such a case. In 1875 a law was passed in Wisconsin[4] authorizing the erection of a dam across a navigable river at public cost, either for the purpose of waterworks for the city, or for the purpose of leasing the water power for private purposes. The supreme court of that state promptly held, upon a case involving the statute being brought before it, that as the power was alternative and optional, either for a public or private use, that it was unconstitutional. Likewise a Michigan statute[6] which attempted to legalize a taking of water from a stream both for public and private uses, was declared unconstitutional by the supreme court of that state.[7] It is plain that under the constitutional provisions in most of our states such legislation is invalid as transgressing the limitation that the power of eminent domain can only be exercised for a public use.

If however the two purposes may be separated, that which is lawful may be sustained.[8] But to permit of such a separation the power granted must not be an optional one, subject to the election of the grantee. In such a case the valid and void provisions are inseparable and the whole statute must be declared unconstitutional. The election being inherent in the grant it is not in the power of the courts to separate the different parts and to uphold some while refusing to uphold the others.[9] Moreover in case a statute provides for a taking for public uses only, an application for the exercise of the right which would leave the grantee an option as to the use to which the property would be put must be refused. The improvement must be devoted to the public use independently of the will of the person taking it.[10]

The question that more frequently arises however is whether or not, where a taking for a public use alone is authorized, an incidental private use may be permitted. It is plain that the converse cannot be allowed. To permit a person to take private property by alleging a public use, the principal object in fact being to devote it to private uses would constitute a palpable evasion of the law. The fact that the public use, so far as it went, was to be promoted bona fide would not affect the result. Thus in an early case in New York

(3) Minnesota Canal & P. Co. v. Koochiching Co., 107 N. W. Rep. 405.

(4) Laws 1875, ch. 333.

(5) Attorney General v. Eau Claire, 37 Wis. 400.

(6) 2 Com. Laws, Sec. 6806.

(7) Berrien Co. v. Berrien Circ. Judge, 133 Mich. 48, 94 N. W. Rep. 379.

(8) State v. Commissioners, 5 Ohio St. 497; State v. Clarke, 54 Mo. 17.

(9) Attorney General v. Eau Claire, 37 Wis. 400.

(10) Ryerson v. Brown, 35 Mich. 333; State ex. rel. Harlan v. Centralia, etc. Co., 42 Wash. 632.

where a person asked to condemn land for a grist-mill, a saw-mill and a paper-mill, a statute providing that the first mentioned purpose alone constituted a public use, the court refused the demand holding that, "If an application of this kind were granted a like application for the erection of iron-works or any other establishment requiring water power might be made and would be entitled to equal favor, provided the applicant as a pretext were to associate a grist-mill with his other works.[11]

But where the public use is the principal factor and the private is truly incidental the law has no objection.[12] Thus a railroad corporation may take land for the purpose of erecting buildings to be used in connection with the road, though such buildings are not part of the equipment for transportation, which alone constitutes the public use.[13]

The private use must not however be too remotely connected with the public use. Where a Massachusetts railroad corporation took certain land by eminent domain for purposes connected with the operation of its road, and then leased the property for warehouse purposes, it was held that a writ of entry would lie against tne corporation. "Although the railroad might derive some advantage from the receipt and delivery of their goods at these buildings instead of in its own freight houses yet that circumstance was not sufficient to qualify the character of the occupation of the buildings so as to bring it within the range of any purpose for which the corporate franchises were granted."[14]

The question whether or not the private purpose is in fact but an incident will usually be decided by the jury.[15]

(11) Harding v. Goodlett, 3 Yerg. 40, 24 Am. Dec. 546.

(12) Lake Koen Co. v. Klein, 63 Kan. 484; Bridal Veil Co. v. Johnson, 30 Ore. 205, 46 Pac. Rep. 790; Toledo, etc., Co. v. E. Saginaw Co. 72 Mich. 227, 40 N. W. Rep. 426.

(13) Tucker v. Tower. 9 Pick. 109.

(14) In re Proprietors, etc. v. N. & L. Co. 104 Mass. 1.

(15) Lake Koen, etc. Co. v. Klein, 63 Kan. 484, 65 Pac. Rep. 684.

Where it appears that more land is demanded than the public purpose requires, only so much as is necessary for that purpose will be granted.[16] Should the applicant by misrepresentation secure more than proves to be necessary he may be ousted from the part that is not essential.

Though fraud will not be imputed to a person who demands certain property under the exercise of this right the courts will nevertheless carefully scrutinize the application. To ascertain the probable use to which the property is to be put the charter of the corporation, in the case of a corporation, is looked to, but is by no means conclusive. The actual business to be conducted will in all cases be ascertained.[17] The fact that the charter of a corporation embraces both public and private uses does not per se deprive such corporation of the right of eminent domain in case the actual use intended is public.

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(16) Cooley Const. Lim. 6th ed. p. 664.

(17) In re Niagara Falls & W. R. Co., 108 N. Y. 375.

TORTS—INTERFERENCE WITH CONTRACTUAL RELATIONS.

KNICKERBOCKER ICE CO. OF BALTIMORE CITY v. GARDINER DAIRY CO.

Court of Appeals of Maryland. March 31, 1908.

Plaintiff having contracted to purchase ice from the S. Company, and having no contractual relations with defendant, defendant notified the S. Company, who received from defendant ice with which to perform its contract with plaintiff and others, that defendant would refuse to deliver any ice whatever to it unless it refrained from delivering ice to plaintiff, whereupon the S. Company broke its contract with plaintiff, and plaintiff was required to purchase ice from defendant under less advantageous terms and conditions. Held, that defendant's act in inducing the S. Company to break its contract with plaintiff, though not malicious, was unlawful and for the purpose of procuring plaintiff's trade for itself, and was therefore actionable.

BOYD, C. J.: This is an appeal from a judgment rendered against the appellant in favor of the appellee for causing the Sumwalt Ice & Coal Company to break a contract

between it and the appellee, by which the former had agreed to furnish the latter with ice. As the first question to be considered is a demurrer to the declaration, which was overruled, we will state the material allegations made in it. It is alleged that the plaintiff was engaged in the dairy business in June, 1906, and required a large quantity of ice during the spring and summer months; that, in order to meet its requirements, it entered into a contract with the Sumwalt Company whereby that company contracted to deliver to the plaintiff, and the plaintiff agreed to buy from it, an amount not exceeding 20 tons of ice each day from the date of the contract until the completion of the plaintiff's plant then in course of construction at the price of $5 per ton delivered; that at the time the Sumwalt Company was purchasing ice in large quantities from the defendant, which was engaged in the manufacture of ice; that the defendant, learning of the contract between the plaintiff and the Sumwalt Company, notified the latter that it would refuse to deliver any ice whatever to it, unless it refrained from delivering ice to the plaintiff; that said Sumwalt Company being compelled by the exigencies of its business to secure ice from the defendant, and being alarmed by the threat of the defendant, broke its said contract with the plaintiff, and advised it that, because of the action of the defendant, it could not carry out its contract with the plaintiff; that thereby the plaintiff was compelled to purchase ice directly from the defendant at a price considerably greater, and on terms considerably less advantageous to it, than it was enjoying under its contract with the Sumwalt Company. It is further alleged that the action of the defendant in causing the Sumwalt Company to break its contract with the plaintiff "was with the desire and intention on the part of the defendant of injuring the plaintiff, and of obtaining a benefit for itself; that said action was deliberate and malicious, and inspired by the wish and purpose to force the plaintiff to buy ice directly from the defendant at a larger price, in larger quantities, and for a longer period than were required of the plaintiff under the terms of its aforesaid contract with the Sumwalt Ice & Coal Company, by which unlawful and malicious action on the part of the defendant the plaintiff has been greatly damaged."

There is great conflict between judges and law writers as to how far there is a remedy for interference with contract relations, and it would be a useless task to undertake to reconcile them. They quite generally agree in their conclusions when the relation of master and servant exists, but even then reach the same point by different routes. Lumley v. Guye, 2 E. & B. 216, is the leading case on the subject. Prior to the dissenting opinion delivered by Justice Coleridge in that case, it seems to have been assumed that the action for enticing servants was a common-law action, but in that opinion he asserted, and with his marked ability undertook to establish, that such was not the case, and that it was founded on the statute of laborers of 23 Edw. III., and that both on principle and authority was limited by it. But, however that may be, that statute was never in force in this state, and could not have been applicable to conditions here, and the right to such action has always been regarded as a part of the common law. Justice Coleridge also undertook to show that the general rule of the English law in respect to breaches of contracts was to confine its remedies by action to the contracting parties; but while it may be conceded that, as a rule, such actions had been confined to those parties, it does not follow that the right of action in third parties did not exist. In Lumley v. Guye there was a demurrer to each of the three counts in the declaration, and it was held by Judges Wightman, Erle, and Crompton, quoting from the syllabus, that "the counts were all good, and that an action lies for maliciously procuring a breach of contract to give exclusive personal services for a time certain, equally whether the employment has commenced or is only in fieri, provided the procurement be during the subsistence of the contract, and produces damage, and that, to sustain such an action, it is not necessary that the employer and employed should stand in the strict relation of master and servant. Semble, by the same judges, that the action will lie for the malicious procurement of the breach of any contract, though not for personal services, if by the procurement damage was intended to result, and did result, to the plaintiff." In Ensor v. Bolgiano, 67 Md. 190, 9 Atl. Rep. 529, Mr. Ensor, an attorney, sued the defendant, alleging that, with malice towards the plaintiff, he induced one Allen to compromise his case against a turnpike company in which the defendant had stock, and to break his contract with the plaintiff to pay him a contingent fee. This court disposed of the case on the ground that there was no legally sufficient evidence to support the action, and declined to express any opinion on the law as laid down in Lumley v. Guye, although Judges Yellot and Bryan filed dissenting opinions in which they approved of the doctrine announced in that case. In Lucke's Case, 77 Md. 396, 26 Atl. Rep. 505, 19 L. R. A.

408, 39 Am. St. Dep. 421, it was held that where an employee, who was performing the duties of his position to the entire satisfaction of his employers, was discharged in consequence of a threat from a labor organization that if he was longer retained it would be compelled to notify all labor organizations of the city that the business house of the employers was a nonunion one, and thus subject them to great loss, such interference was wrongful, and an action would lie against the labor organization by the employee for the damage he sustained in consequence of such discharge. The evidence showed that the employee was to continue in the employ of his employers as long as his work was satisfactory, but they reserved the right to discharge him at the end of any week. A member of the firm testified that they would not have discharged him except for the objections of the appellee. This court quoted with approval from Benton v. Pratt, 2 Wend. (N. Y.) 385, 25 Am. Dec. 623, that: "Where a contract would have been fulfilled but for the false and fraudulent representations of a third person, an action will lie against such person, although the contract could not have been enforced by action." It also quoted at length from Chipley v. Atkinson, 23 Fla. 206, 1 So. Rep. 934, 11 Am. St. Rep. 367, which said that neither the fact that the term of service interrupted was not for a fixed period, nor that there was a right of action against the person induced or influenced to terminate the service, or to refuse to perform his agreement, was of itself "a bar to an action against the third person maliciously and wantonly procuring the termination of, or a refusal to perform, the agreement. It is the legal right of the party to such agreement to terminate or refuse to perform it, and in doing so he violates no right of the other party to it; but, so long as the former is willing and ready to perform it, it is not the legal right, but is a wrong on the part of a third party maliciously and wantonly to procure the former to terminate or refuse to perform it." The court also quoted from Bowen v. Hall, L. R. 6 Q. B. D. 338, which we will refer to later. It said that the Lucke case and that of Lumley v. Guye "widely differ in important facts, and there is but small analogy in the principles of law properly applicable in each case;" but it will be observed that it announced principles which are analogous to those sought to be applied in this case. It distinctly held that an action by an employee would lie against a third person who maliciously and wantonly procured the termination of the arrangement between the employer and employee, which was not for a definite period, and the facts show that Lucke was not a mere menial servant, but a skilled "first- class customs cutter."

Some material distinctions between that case and the one before us are apparent; but it does go one step further than the cases usually found in the books in which the relation of master and servant or employer and employee is in any way involved, and there was not as here a binding contract between the parties. Generally speaking, such suits have been by the master for the enticement of his servant, while the Lucke case was by an employee against a third person for causing his discharge by the employer; and it is difficult to see why, upon principle, a party to a contract should be confined to an action against the other party for a breach of it, when a third party has been the deliberate cause of the breach, for his own selfish or malicious purposes. To say that he has his remedy against the other contracting party is in many cases offering a mere shadow for substance, for oftentimes he may have his trouble for his pay, as the other party to the contract may be financially irresponsible. Why should a labor organization, which has the right to organize and act for the protection and benefit of its members so long as it does not infringe upon the rights of others, be responsible for causing the discharge of one who it believes interferes with the interests of its members by being so employed, while an employer of labor can maliciously and wantonly, or for his own selfish purposes, cripple another employer with impunity? If the Clothing Cutters' and Trimmers' Assembly was liable for causing the New York clothing house to discharge Lucke, why should not some importer or wholesale dealer have been liable to that house if he had procured some other importer or dealer with whom it had a contract, and upon whom it was dependent to secure such goods, to break his contract with that house, and thereby force it to deal on disadvantageous terms with the procurer? Such distinction, based on the technical ground that the relation of master and servant exists in the one case and not in the other, would be well calculated to impress laborers with the belief that the law discriminates between labor and capital, making the one responsible, but not the other. Trusts and combinations of capital have ruined many while hiding behind means apparently lawful; but if they cannot be reached when it is shown that they have maliciously and wantonly, or for their own selfish purposes, not only prevented others from making contracts, but compelled contractors to break their contracts, then indeed is the law helpless. Yet that is just what the theory of the appellant,

if adopted, might lead to, and it should not be adopted unless clearly within well-established principles of law. And when we are called upon to determine that question, we are not to be governed entirely by the lack or scarcity of precedents furnishing a remedy. Principles of law ought not to be stretched beyond reason and justice, but they ought not unnecessarily to be so contracted as to allow them to be made use of as instruments of oppression. This court quoted in Lucke's case from Winsmore v. Greenbank, Willes' Rep. 581, where it was said: "Special action on the case was introduced for the reason that the law will never suffer an injury and a damage without a remedy." In Bottomly v. Bottomly, 80 Md. 162, 30 Atl. Rep. 77, Judge Bryan stated that: "Where it is said that, when the plaintiff has a right he must have a remedy, if he is injured in the enjoyment of it, it must necessarily be understood that the injury must be an act which is unlawful in itself, or that it is rendered unlawful by the circumstances under which it is committed." And in speaking of Lucke's case he said: "We held that the conduct of the defendant was malicious and unlawful, and that it gave the plaintiff a good cause of action. It was a scheme to accomplish an unlawful result by unlawful means." So in Gore v. Condon, 87 Md. 368, 39 Atl. Rep. 1042, 40 L. R. A. 382, 67 Am. St. Rep. 352, after stating the facts fully, Judge Briscoe, in delivering the opinion of the court, said: "The question then is whether the conduct of the defendant under the circumstances stated in this case constituted such a wrongful act as will give rise to an action for damages." In that case the plaintiff was the owner of some houses and lots, and the defendant obtained a mortgage thereon from a person he knew was not the owner, and, although knowing that the mortgage was fraudulent and void, caused the tenants of the property to cease paying their rents to the plaintiff, and advertised the property for sale under an ex parte decree of foreclosure on the mortgage, which was afterwards vacated by a court of equity. The tenants moved away, and the plaintiff lost the rents. It was held that, "if a man knows that certain property is not his but another's, and that his apparent title to the same was acquired by fraud and is void, then his intermeddling with such property to the damage of the real owner is an unlawful act for which an action lies." It was also said: "The right to maintain the action can also be sustained, upon the doctrine that a man who induces one of two parties to a contract to break it, intending thereby to injure the other, or to obtain a benefit for himself, does the other an actionable wrong"—citing Lucke's case, Angle v. Chicago, etc., Ry., 151 U. S. 14, 14 Sup. Ct. Rep. 240, 38 L. Ed. 55, Lumley v. Guye, Bowen v. Hall, supra, and Walker v. Cronin, 107 Mass. 555. It cannot be denied that it is unlawful for a party to a contract to break it, unless, of course, he has sufficient ground for doing so; and therefore, when a third party procures or induces him to do so, he is causing him to do an unlawful act, which is itself unlawful, and the law ought to afford a remedy to the injured party. In the appendix to 87 Maryland there is a note on Gore v. Condon by Mr. Brantly, which considered at length the subject of interference with contracts, etc., with his usual clearness. Some of the questions discussed in that note are not involved in this case; for example, the distinction made by some authorities between preventing a contract being made and causing one already made to be broken. This declaration distinctly alleges that a contract had been made, and that the defendant caused the Sumwalt company to break it, and there is testimony tending to sustain those allegations. In Lucke's case it was held that the defendant was liable, although there was no contract in force requiring the employers to continue his employment, but that part of the decision relied on the discharge, connected with the fact that he would have been continued but for the threats and action of the defendant. In addition to the authorities cited in Gore v. Condon, supra, there are many others in which it has been held that procuring a breach of an existing contract is actionable. In Perkins v. Pendleton, 90 Me. 166, 38 Atl. Rep. 96, 60 Am. St. Rep. 252, the court cited with approval Lumley v. Guye and Bowen v. Hall. After quoting at length from the latter it said: "The doctrine of those cases has been very generally adopted, and the cases themselves very frequently cited, but the courts of this country"—citing a number of them, and added: "In view of these authorities and others, which it is not necessary to refer to, it must be conceded that for a person to wrongfully, that is, by the employment of unlawful or improper means, induce a third party to break a contract with the plaintiff, whereby injury will naturally and probably, and does in fact, ensue to the plaintiff, is actionable, and the rule applies both upon principle and authority as well to cases where the employer breaks his contract as where it is broken by the employee. In fact, it is not confined to contracts of employment." The court cited Walker v. Cronin, Chipley v. Atkin-

son, Lucke's case, Raycroft v. Tayntor, 68 Vt. 219, 35 Atl. Rep. 53, 33 L. R. A. 225, 54 Am. St. Rep. 882, and others. See, also, Jones v. Stanly, 76 N. C. 355.

The English cases have for the most part sustained Lumley v. Guye. In Bowen v. Hall, supra, Judge Brett and Lord Chancellor Selborne delivered opinions affirming Lumley v. Guye, Lord Coleridge, C. J., dissenting. Judge Brett said that the decision of the majority in that case held that "wherever a man does an act which in law and in fact is a wrongful act, and such an act as may, as a natural anl probable consequence of it, produce injury to another, and which in the particular case does produce such an injury, an action on the case will lie." And again he said: "Merely to persuade a person to break his contract may not be wrongful in law or fact, as in the second case put by Coleridge, C. J. But if the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant at the expense of the plaintiff it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it. We think that it cannot be doubted that a malicious act, such as is above described, is a wrongful act in law and in fact." In Allan v. Flood (1898) A. C. 1, a conclusion was reached which is not in accord with Lucke's case, but Lumley v. Guye was not overruled, although commented on in the opinion filed. In Quinn v. Leathem (1901) A. C. 495, Lord Macnaghten, in referring to Lumley v. Guye, said: "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognized by law if there be no sufficient justification for the interference." Lord Lindley also expressed the same views. In South Wales Miners' Federation v. Glamoyan Coal Co. (1905) A. C. 239, it was held that, "procuring a breach of contract is an actionable wrong unless there be justification for interfering with the legal right," and Lumley v. Guye was cited with approval by Lord Lindley, while in the other opinions it was not questioned.

It would seem, therefore, that Lumley v. Guye has never been overruled in England, but is the leading case on this general subject. It has been adopted or cited with approval in a number of cases in this country, including Gore v. Condon. It is not altogether easy to lay down general rules as established by the cases, but some principles are quite well settled by them. It may be safely said that, if wrongful or unlawful means are employed to induce the breach of a contract, and injury ensues, the party so causing the breach is liable in an action of tort. While lawful competition must be sustained and encouraged by the law, it is not lawful, in order to procure the benefit for himself, for one to wrongfully force a party to an existing contract to break it, and a threat to do an act which would seriously cripple, if not ruin, such party, unless he does break it, is equivalent to force, as that term is used in this connection. We say "wrongfully" force, because the procurer would not be liable if he had the right to compel the party to break the contract. For example, if the contract between the Knickerbocker Company and the Sumwalt Company prohibited the latter from selling ice to any customer of the former, and the Gardiner Company was a customer within the meaning of the contract, it would not necessarily be wrongful for the Knickerbocker Company to refuse to deliver ice to the Sumwalt Company for the Gardiner Company. In other words, it has the right to protect its own contracts, and merely because its action in that respect would result in the Sumwalt Company not being able to furnish the Gardiner Company would not make the Knickerbocker Company liable to the latter; but if the object of the Knickerbocker Company was merely to procure the trade of the Gardiner Company, and for that purpose threatened to refuse to furnish the Sumwalt Company with ice unless it violated its contract with the Gardiner Company, although there was no contract between the Knickerbocker Company and Sumwalt Company which prohibited the latter from selling to the Gardiner Company, then the Knickerbocker Company would be liable to the Gardiner Company for injury sustained by it for breach of the contract by the Sumwalt Company so procured. That is an illustration by what is meant in the South Wales' Miners' Federation Case, supra, where it is said that, "procuring a breach of contract is an actionable wrong, unless there be justification for interfering with the legal right." Again, the mere fact that a party acts from a bad motive or maliciously does not necessarily make him liable. If he has the right to act, his motive in acting cannot of itself make his act wrongful; but if he had no right to procure a breach of contract, and resorts to unlawful means in doing so, he is liable to the injured party. We say "unlawful means," because a party may be the means of causing a contract to be broken,

and still not be liable. To illustrate: A. may advertise his goods for sale at such a low rate as to result in a breach of contract by B., who was under contract with C. to buy at a higher price, but that would not make A. liable to C.; or, to make the illustration more apt, if the Knickerbocker Company had simply refused to furnish the Sumwalt Company with ice, the Gardiner Company would not for that reason alone have a remedy against the Knickerbocker Company. Such action would not necessarily be unlawful or wrongful, but if the Knickerbocker Company refused to furnish the Sumwalt Company if it furnished the Gardiner Company, although it knew it was under contract to do so, in order to get the business of the Gardiner Company for itself on its own terms, then it was unlawful to thus interfere with the contract between the Sumwalt Company and the Gardiner Company. So without further pursuing that branch of the case we are of the opinion that the demurrer was properly overruled, as the declarations stated an actionable wrong, even if there had been no express allegation of malice.

NOTE.—*Interference with Contract Relations Other Than That of Master and Servant.*—The principal case had escaped our notice until our attention was attracted to it only recently and we recognized the great principle which it formulates with some definiteness for the first time in this country.

Recent years have witnessed the unfolding of old principles of law into wonderful doctrines unknown to the ancients, which not only are intended to fit the exigencies of our present civilization, but are marvelous evidences of the ability of the human mind to extend logically those unchangeable principles of justice which govern the relations of all men in all ages and adjust them to the circumstances of a more and more complex mode of living. In no case is this development more striking than in the progress of the law on the subject matter of this annotation.

No matter what unimportant discoveries may have been made in the Year Books by Lord Justice Coleridge or the author of Brooke's Abridgement who reached different conclusions on the question whether the common law recognized an action for interference with contract relations, we are assured of this fact that in those early centuries there was not the same necessity for the application of this principle as there is to-day, except in the case of the enticement of servants, and there we are perfectly assured by the authorities that there was no uncertain application of the principle that no man has a right to wrongfully interfere with the contractual relations of another. Whether these early authorities draw their authority from ancient common law principles or from a statute of laborers passed in the reign of Edward III, it is immaterial to determine because all these early authorities proceed on the assumption that the interference with contract relations by third persons at least in the case of the enticement of servants, was a common law tort. And it can readily be admitted that the provision in the statute of laborers was merely declaratory of principles already laid down by the common law tribunals.

In the gradual extension of this principle it is not surprising that its growth should be along the line of the relation of master and servant. And there indeed we find the first great and leading expositions of the great doctrine which has now assumed such an important aspect.

Lumley v. Gye, 2 El. and Bl. 216, is indeed the leading case on this question. It is the first great declaration on the subject. That case holds that "an action lies for maliciously procuring a breach of contract to give exclusive personal services for a term certain." As shown by the court in the principal case, this great declaration was not overruled by Allan v. Flood or Quinn v. Leathem, but only modified by withdrawing the element of "malicious intention" as the "gist of the action." And the ground of the action is stated in the language of Lord Macnaghten, in Quinn v. Leathem, to be that the "violation of a legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with the contractual relations recognized by law if there be no sufficient justification for the interference." This declaration both widens and contracts the great doctrine here involved. It opens and widens the scope of it by extending the principle to the violation of any legal right and narrows and resists its operation by suggestion certain circumstances of justification for such interference which we shall not discuss at this time.

And thus we observe the gradual growth of the narrow application of a great principle of law to the case of the enticement of servants into a great doctrine, which, having outgrown its small shell which confined its operation to the relation of master and servant, does now assume to proscribe all meddling interference with the contractual relations of another. The courts were loath to enter upon such a broad unchartered sea and have hesitated as they have lost sight of the old moorings and attorneys whose interest in a particular case have been best served by keeping the old doctrine within its ancient limitations have not hesitated to predict dire consequences if these ancient landmarks were removed and new ones sought to be set. But courts of the ability of the court in the principal case who are competent to blaze a way through the unknown future, are not fearful of the consequences when

assured that they have started from the vantage point of sound principle.

And thus we have the American courts essaying boldly to declare the new doctrine that an interference with any contract relation of another is an actionable wrong and determining in each case the sufficiency of any justification which may be pleaded. Angle v. Railroad, 151 U. S. 1; Jones v. Stanly, 76 N. Car. 356; Morgan v. Andrews, 107 Mich. 33; Louisville, etc. R. R. v. McConnell, 82 Fed. Rep. 65; Jackson v. Stanfield, 137 Ind. 592. Lawyers will find all these decisions very interesting as offering valuable suggestions for future litigation for which the authorities at the present time offer no precedent.

JETSAM AND FLOTSAM.

TYPEWRITTEN WILLS.

The practice of typewriting wills was recently condemned by the surrogate of King's County, because of the ease of alteration. In the New York Law Journal a correspondent suggested that the following simple precautions would obviate these objections:

"(1) Have the testator sign at bottom of each page.

"(2) Have the typewriting free of erasures or interlineations, with all blank space ruled off.

"(3) Recite in the intestimonium clause the facts.

"(a) That the will is contained on so many sheets of paper.

"(b) That the testator has subscribed his name at the bottom of each sheet thereof, and 'to this, the last sheet thereof, he has hereto subscribed his name and affixed his seal,' etc.

'While no seal is necessary, and but two witnesses are required in this state, by adding the seal and a third witness a will thus executed is probatable in every state of the Union.

"It is my uniform custom to have all wills executed in this manner so as to provide against local intestacy consequent upon a testator becoming afterwards seized of real property in a state foreign to his domicile or to the place where the will is executed."

A still simpler precaution, and one which will prove most efficacious, is to make a letter press copy of the original typewritten sheets. After the sheets have once been wet and dried they are at least as difficult to alter as handwriting.—Green Bag.

HUMOR OF THE LAW.

Judge—What have you to say as to the charge that, while the husband of one woman, you married three others?"

Bigamist—Simply this: that having four of a kind isn't what it is cracked up to be.

The lawyer was doing a cross-examining stunt.

"Now, sir," he said to the witness, "tell the court how far you were from the accused when he fired the shot."

"Thirteen feet, seven and three-quarters inches," answered the witness.

"Oh, come now," said the lawyer, "how can you tell to the fraction of an inch?"

"I knew some fool would ask me," replied the other, 'so I measured it."—Exchange.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Accident Insurance**—Payment of Premiums.—Where it does not appear that an accident insurance association had authorized remittances of dues by mail, payment is not made when the letter containing the remittance is deposited in the post office.—Travelers' Protective Ass'n. of America v. Roth, Tex., 108 S. W. Rep. 1039.

2. **Accord and Satisfaction**—Part Payment.—A settlement of an unsecured debt by merging it in a secured obligation for a smaller amount is based on a consideration and is enforceable.—In re Black Diamond Copper Min. Co., Ariz., 95 Pac. Rep. 117.

3. **Animals**—Quarantine.—The power conferred by statute on sheep inspectors to quarantine sheep infected with or which have been exposed to infectious diseases is not inhibited by the Constitution, since it is practically the only method by which the state can enforce its

police regulations.—Richter v. State, Wyo., 95 Pac. Rep. 51.

4. **Appeal and Error**—Assignment of Error. —An assignment of error that "the court erred in rendering judgment for plaintiff in said cause" is too general to be considered.—Stearns & Culver Lumber Co. v. Adams, Fla., 45 So. Rep. 847.

5.——Findings of Fact.—In the absence of a special finding of facts or request therefor in an action tried to the court, the answer on a writ of error is limited to the sufficiency of the petition and rulings on questions of law during the trial, if any have been preserved.—Hayden v. Ogden Sav. Bank, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 90.

6.——Law of the Case.—The rule known as "the law of the case" cannot be invoked except as to questions actually considered and determined in the first appeal, and in its application cognizance will be taken of such points only as appear to have been decided in the former appeal.—Alerding v. Allison, Ind., 83 N. E. Rep. 1006.

7.——Proceedings Below.—A judgment entered in the lower court after reversal in conformity with the opinion of the appellate court must be considered in connection with the opinion.—Taylor v. Taylor, Ky., 108 S. W. Rep. 243.

8.——Record on Appeal.—Where the contract sued on is not incorporated in the record on appeal, the court will not determine whether the proper measure of damages was applied by the trial court.—Cowart v. Walter Connolly & Co., Tex., 108 S. W. Rep. 973.

9.——Rehearing.—Where a mandate on appeal directed the lower court to find relief for appellants on their cross-complaint and it appears that the cross complaint does not entitle them to such relief, the mandate will be modified on petition for rehearing and the petition overruled.—Small v. Binford, Ind., 84 N. E. Rep. 19.

10.——Reservation of Grounds for Review.—Errors relating to matters of exception occurring on the trial and not appearing on the record proper held not reviewable on appeal, in the absence of a motion for new trial filed within the statutory period.—Cantwell's Adm'x. v. City of Cassville, Mo., 108 S. W. Rep. 1084.

11.——Sufficiency of Statement.—Where it does not appear from the statements in the brief that a certain defense was raised by the evidence, there is no error in refusing to charge such defense.—Hirsch v. Patton, Tex., 108 S. W. Rep. 1015.

12.——Transcript.—A transcript not allowed to remain in the lower court for 20 days after service of notice upon opposite party that it has been filed, as required by Laws 1907, p. 124, c. 74, sec. 15, will be stricken from the files of the supreme court.—City of Bisbee v. Hargrove Ariz., 94 Pac. Rep. 1112.

13. **Assault and Battery**—Instruction.—In an action for an assault, an instruction held not objectionable as authorizing a recovery, even though defendant did not strike plaintiff.—Burley v. Menefee, Mo., 108 S. W. Rep. 120.

14. **Assignments for Benefit of Creditors**—Management and Estate.—An assignee for the benefit of creditors held bound to exercise the care that an ordinarily prudent person would use in his own affairs.—Cominger v. Louisville Trust Co., Ky., 108 S. W. Rep. 950.

15. **Bankruptcy**—Acknowledgment. — A foreign assignment by a bankrupt, though voluntarily executed, will not operate to convey real estate in Arizona, where it was not acknowledged as provided by the Arizona statute for the acknowledgment of deeds.—In re Delehanty's Estate, Ariz., 95 Pac. Rep. 109.

16.——Compositions.—The bankruptcy law does not provide that compositions, though informal, or preferences, shall be void as between the parties.—In re Black Diamond Copper Min. Co., Ariz., 95 Pac. Rep. 117.

17.——Corporations.—Where a nonresident stockholder of a bankrupt corporation was claimed to have knowledge of the fraudulent overvaluation of the assets for which the corporation's stock was issued, its trustee in bankruptcy could not compel her to answer in the bankruptcy proceedings on an order to show cause, delivered by mail and by publicatin.—In re Haley, U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 74.

18.——Foreign Assignment.—A foreign assignment by a bankrupt, though voluntarily executed, will not operate to convey real estate in Arizona, where it was not acknowledged as provided by the Arizona statute for the acknowledgment of deeds.—In re Delehanty's Estate, Ariz., 95 Pac. Rep. 109.

19.——Fraudulent Transfers.—An individual bankrupt's estate having been fraudulently conveyed to certain persons who thereupon created a corporation, which thereafter became a bankrupt, the corporation's assets held not payable to the individual bankrupt's trustee, nor were the latter's creditors entitled to file their claims against the corporation's estate in bankruptcy. —In re L. M. Alleman Hardware Co., U. S. D. C. M. D. Pa., 158 Fed. Rep. 119.

20.——Insurance by Receiver.—Insurance on personal property taken out by a receiver, if paid for by him, is a proper subject of credit in his accounts; but not, if left to be taken care of by the trustee, as a matter inuring to the benefit of the estate.—In re Kyte, U. S. D. C., M. D. Pa., 158 Fed. Rep. 121.

21.——Partnership.—Under 14 Del. Laws, p. 652, c. 562, sec. 1, held, that two members of a bankrupt firm having their domicile in Delaware were entitled to exemptions of all wearing apparel in accordance with such law.—In re H. L. Evans & Co., U. S. D. C., D. Del., 158 Fed. Rep. 153.

22.——Preferences.—Payments to certain creditors by an insolvent corporation held, under the evidence, to have been made with intent to prefer such creditors, and to constitute acts of bankruptcy.—John Naylor & Co. v. Christiansen Harness Mfg. Co., U. S. C. C. of App., Sixth Circuit, 158 Fed. Rep. 290.

23.——Seizure in Replevin.—Bankr. Act July 1, 1898, c. 541, Sec. 67f, 30 Stat. 565 (U. S. Comp. St. 1901, p. 3450), held sufficiently broad to vacate a seizure under a replevin writ against a bankrupt on the day prior to the filing of a bankruptcy petition against him and the appointment of a temporary receiver of his property.—In re Rudnick & Co., U. S. D. C., S. D. N. Y., 158 Fed. Rep. 223.

24.——Subrogation.—An assignee of a judgment and execution held entitled to subrogation to the rights of the judgment creditor, and entitled to reimbursement out of the proceeds of the bankrupt judgment debtor's property for the amount advanced to secure such assignment, as against the bankrupt's trustee and general creditors.—In re Bruce, U. S. D. C., N. D. N. Y., 158 Fed. Rep. 123.

25.——Suit by Trustee.—A petition by a trustee in bankruptcy to compel the bankrupt's assignee for the benefit of creditors to settle his account held complete without certain allegations.—Comingor v. Louisville Trust Co., Ky., 108 S. W. Rep. 950.

26. **Benefit Societies**—Agents of Insured.—The stipulation in a mutual benefit insurance policy that the local secretary should be the agent of insured in the remittance of past due premiums held invalid as requiring inconsistent duties.—United States Benev. Soc. v. Watson, Ind., 84 N. E. Rep. 29.

27. **Bigamy** — Powers of Government. — The framers of the constitution in employing the words, "bigamous, polygamous plural, celestial and patriarchal marriages, intended to prohibit a man having more than one wife at any one time, under whatever name he may choose to style his marriage.—Toncray v. Budge, Idaho, 95 Pac. Rep. 26.

28. **Bills and Notes**—Non-negotiable Notes.—A recital in a note that the title to the property for which it is given shall remain in the payee, and he shall have the right to take possession when he deems himself insecure, renders such instrument non-negotiable under Sess. Laws 1903, pp. 380, 381, Secs. 1, 5.—Kimpton v. Studebaker Bros. Co., Idaho, 94 Pac. Rep. 1039.

29.——Purchasers for Value.—A bank discounting a note and crediting the amount thereof on the indorser's account without paying to him any value, is not a bona fide purchaser for value.—Elgin City Banking Co. v. Hall, Tenn., 108 S. W. Rep. 1068.

30. **Bonds** — Allegations as to Seal. — An averment that the individual seals of township commissioners on railroad aid bonds sued on would have had no legal efficacy held an averment of a conclusion, not affecting the force of an allegation that the bonds were executed under the seals of the commissioners.—Smythe v. Inhabitants of New Providence Tp., U. S. C. C., D. N. Jer., 158 Fed. Rep. 213.

31. **Boundaries**—Estoppel.—A person allowing another to build partly on his homestead held not estopped to assert his true boundary.—Werkheiser v. Foard, Tex., 108 S. W. Rep. 983.

32. **Cancellation of Instruments** — Mistake.—A written contract deliberately entered into and intelligently made will not be set aside, except on satisfactory proof of mistake.—Kennedy v. Fulton Mercantile Co., Ky., 108 S. W. Rep 948.

33. **Carriers**—Charges.—When a freight rate has been fixed and posted and published as required by the interstate commerce act, such rate must prevail over an agreement fixing a different rate.—Fisher v. Great Northern Ry. Co., Wash., 95 Pac. Rep. 77.

34.——Concurrent Negligence. — Where passengers on a street car are injured by the concurrent negligence of the street car company and another railroad company, they can sue the two companies jointly.—Lindenbaum v. New York, N. H. & H. R. Co., Mass., 84 N. E. Rep. 129.

35.——Injury to Alighting Passenger.—If a street car conductor knew or had reason to believe that plaintiff was about to alight, and with such knowledge permitted the car to be started so as to cause plaintiff to be thrown down and injured, the company is liable for the injury if plaintiff was free from fault.—El Paso Electric Ry. Co. v. Boer, Tex., 108 S. W. Rep. 199.

36.——Instructions in Personal Injury.—In an action against a carrier for injuries to a passenger, an instruction authorizing a verdict for defendant if the injury to plaintiff was the result of an accident held properly refused.—Skiles v. St. Louis, I. M. & S. Ry. Co., Mo., 108 S. W. Rep. 1082.

37.——Loss of Goods.—Where a consignee of goods shipped over defendant's line called for them, and was told that they were there, but could not be delivered to him until the next day and were destroyed by fire that night, defendant's liability was that of a carrier.—Fisher v. Northern Pac. Ry. Co., Wash., 94 Pac. Rep. 1073.

38.——Negligence.—Evidence of plaintiff in an action for injuries due to a caboose on which he was a passenger being struck by an engine held not to raise the question of contributory negligence so as to impose on him the duty to remove the suspicion of his own negligence.—Herring v. Galveston, H. & S. A. Ry. Co., Tex., 108 S. W. Rep. 977.

39.——Obligation toward Trespasser.—A carrier is bound to accord to a trespasser on a train humane treatment, and cannot inflict brute violence on him or employ more force than is needed to eject him, and ejecting him under circumstances indicative of inhumanity or reckless disregard of life may entitle him to an action.—Beck v. Quincy, O. & K. C. R. Co., Mo., 108 S. W. Rep. 132.

40.——Pleadings in Negligence Action. — Where plaintiff in an action against a railroad for injuries pleads that the rails had not been properly spiked to the ties and the ground properly tamped, he cannot recover on other grounds.—Norton v. Galveston, H. & S. A. Ry. Co., Tex., 108 S. W. Rep. 1044.

41. **Commerce**—Regulations. — A contract through rate on canned goods involving ocean transportation less than the railroad carrier's posted rate held not unlawful, in the absence of evidence that the conditions attending ocean competition did not justify the lesser rate.—Fisher v. Great Northern Ry. Co., Wash., 95 Pac. Rep. 77.

42.——Regulation of Telegraph Companies.—Pub. Acts 1893, p. 312, No. 195, sec. 1, making a telegraph company liable for negligence to the amount of loss sustained, held only to apply when a company asks to be discharged because of a contract limiting liability to the amount received for sending, and to apply the act to an interstate message, is not to give the act extraterritorial effect.—Commercial Milling Co. v. Western Union Telegraph Co., Mich., 115 N. W. Rep. 698.

43.——State Regulation. — The legislature may make such reasonable rules governing its domestic commerce as seem best fitted for the interest of its citizens, provided such regulations do not burden or interfere with the interstate commerce of the nation.—State v. Missouri Pac. Ry. Co., Neb., 115 N. W. Rep. 614.

44. **Constitutional Law**—Class Legislation.—The provision of House Enrolled Bill No. 418 of 1907 (Loc. Laws 1907, p. 981, No. 684), establishing a juvenile court, which excepts from its operation children who are inmates of other charitable or semicharitable institutions subject to the visitorial powers of the board of corrections and charities, is not void as class legislation.—Robison v. Wayne Circuit Judges, Mich., 115 N. W. Rep. 682.

45.——Construction.—The interpretation giv-

en to a constitution by the first legislative body which acts thereunder is a contemporary construction to be treated with great deference.—McPhee & McGinnity Co. v. Union Pac. R. Co., U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 5.

46.——Powers of Government.—It is competent for the legislature to authorize the contesting of elections, and to prescribe the manner and method of conducting the same, and to establish or designate the court or tribunal before which such contest shall take place.—Toncray v. Budge, Idaho, 95 Pac. Rep. 26.

47.——Territorial Legislature.—The legislature of a territory is on the same footing as a state legislature so far as regards its power to delegate legislative power to the people; neither one having such power in the absence of express provision therefor.—Thalheimer v. Board of Supr's of Maricopa County, Ariz., 94 Pac. Rep. 1129.

48.——Vested Rights.—A stockholder in a foreign corporation held not to have a vested immunity from liability upon his unbarred statutory obligation as a stockholder because of delay in its enforcement pending the enactment of laws in the state of the corporation's domicile to enable the enforcement thereof against foreign stockholders.—Converse v. Ayer, Mass., 84 N. E. Rep. 98.

49. **Contracts**—Construction. — The determination of whether there was but one modified contract or distinct contracts depends primarily on the intent of the parties.—Mulcahy v. Deudonne, Minn., 115 N. W. Rep. 636.

50.——Department Store Space.—A letter written by a licensor to the licensee of space in a department store relative to the latter's breach of the contract held not a notice of rescission, but of the licensor's election to treat the contract as terminated, and to recover damages for the breach.—R. H. White Co. v. Jerome H. Remick & Co., Mass., 84 N. E. Rep. 113.

51.——Performance.—The necessity for the production of a certificate of approval by the architect as a condition precedent to an action on the contract held dispensed with, the refusal being unreasonable.—Coplew v. Durand, Cal., 95 Pac. Rep. 38.

52.——Time for Performance.—A building contract not providing when it is to be performed on the contractor's bond, given, he is entitled to a reasonable time.—Clark v. Gulesian, Mass., 84 N. E. Rep. 94.

53.——What Law Governs.—In an action to recover an assessment levied upon defendant as a stockholder, in a foreign corporation, his liability will be determined by the laws of the domicile of such corporation.—Converse v. Ayer, Mass., 84 N. E. Rep. 98.

54. **Corporations**—Contracts.—A corporation can act only through its agents, and, when it is sought to hold a corporation liable on a contract alleged to have been made by an agent the name of the agent should be stated in the petition.—Gulf & I. Ry. Co. of Texas v. Campbell, Tex., 108 S. W. Rep. 972.

55.——Liability as Partners.—Where defendant signed a contract with plaintiff in the name of a proposed corporation, and the corporation was not thereafter organized, they became liable upon the contract as partners.—Kennedy v. Fulton Mercantile Co., Ky., 108 S. W. Rep. 948.

56.——Liability to Assessment.—A director of a corporation who voted as such for the levying of an assessment on the capital stock is estopped to object to irregularities in the assessment, and the estoppel binds the assignee of his interests.—Campbell v. Santa Maria Oil & Gas Co., Cal., 95 Pac. Rep. 39.

57.——Members.—It is in general essential to the validity of acts done at a special or called meeting of a corporation that the call shall be made by the persons appointed by the governing statute to call such meetings, and notice must be given at the time and in the manner prescribed.—Riggs v. Polk County, Or., 95 Pac. Rep. 5.

58.——Sale of Franchise.—A quasi public corporation possessing a public franchise held without power to sell its property and franchise without legislative authority therefor.—Weld v. Gas & Electric Light Comr's., Mass., 84 N. E. Rep. 101.

59.——Ultra Vires Acts.—A corporation organized under Gen. St. c. 56, cannot, after receiving the benefits of a purchase, plead that its act was ultra vires, in bar of payment of the price.—Albin Co. v. Commonwealth, Ky., 108 S. W. Rep. 299.

60. **Counties**—Taxation.—Under Const. sec. 157, limiting the tax rate for counties, the levy in excess of the legal limit is void, and neither the county nor the collector nor his deputies has any right to the excess collected, but it belongs to the taxpayers.—Boone v. Powell County, Ky., 108 S. W. Rep. 251.

61. **Courts**—Statutes of Other States.—In an action in Massachusetts against a stockholder in a Minnesota corporation, a judicial construction by the courts of that state of Minn. Const. art. 10, sec. 3, imposing certain liabilities on stockholders, held conclusive.—Converse v. Ayer, Mass., 84 N. E. Rep. 98.

62. **Creditor's Suit**—Pleading.—An action authorized by Civ. Code Prac. sec. 439, to subject property to the satisfaction of a judgment, cannot be maintained unless it affirmatively appears from the petition that plaintiff has a judgment as well as an execution.—Morrison v. Fletcher, Ky., 108 S. W. Rep. 267.

63. **Criminal Evidence**—Res Gestae.—Where the victim of an assault is of an age to render it improbable that his statement with respect thereto was deliberate and its effect premeditated, it is not required that such statement to be admissible as evidence shall have been so nearly contemporaneous with the event as in case of an older person.—Soto v. Territory, Ariz., 94 Pac. Rep. 1104.

64. **Criminal Law**—Admissions. — Accused having admitted that he was a wholesale liquor dealer, and not having objected at the trial to the introduction of parol evidence of such fact, he could not object on a writ of error that the court should have required proof thereof by the revenue collector's certificate.—Williams v. United States, U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 30.

65.——Appeal.—Attorneys held to be presumed to know the procedure necessary to secure an extension of time preparing a bill of exceptions, and where they fail to observe it, their misunderstanding or misconstruction of the statute cannot excuse their default.—People v. Simmons, Cal., 95 Pac. Rep. 48.

66.——Questions for Review.—Burns' Ann. St. 1908, sec. 2345, making the carrying of concealed deadly weapons an offense not being in conflict with Const. sec. 32, giving the people the right to bear arms, the question whether, if construed as applying to a peace officer, it

is constitutional, will not be considered, where it is not presented by the record.—McIntire v. State, Ind., 83 N. E. Rep. 1005.

67. **Criminal Trial**—Argument of Counsel.—Where, in a criminal prosecution, defendant objected to remarks of the prosecuting attorney in his argument, and no exception was taken that the judge's rebuke to the attorney was insufficient, the point will be waived.—State v. Baker, Mo., 108 S. W. Rep. 6.

68.——Continuance.—The granting or refusing a continuance is matter so largely resting in the discretion of the trial court that the supreme court will not interfere unless such discretion has been unwisely exercised.—State v. Horn, Mo., 108 S. W. Rep. 3.

69.——Interpreters.—Where no exception was taken to permitting an interpreter to act before or at the time he so acted or the matter called to the attention of the court on motion for new trial, the court of appeals will not consider it.—Nioum v. Commonwealth, Ky., 108 S. W. Rep. 945.

70.——Newly Discovered Evidence.—A new trial for newly discovered evidence held properly denied, where it was not of such a character as would probably have a preponderating influence on another trial.—Nioum v. Commonwealth, Ky., 108 S. W. Rep. 945.

71.——Prejudicial Error.—To permit a witness to testify that there had been an indictment against accused and that there was a record of conviction, held error.—People v. Jones, N. Y., 84 N. E. Rep. 61.

72. **Damages**—Breach of Contract.—In an action for breach of a contract for the letting of space in a department store, the licensor held entitled to recover the loss of rentals for the remainder of the contract term after having used reasonable diligence to use the space abandoned to decrease the damages.—R. H. White Co. v. Jerome H. Remick & Co., Mass., 84 N. E. Rep. 113.

73.——Contract to Deliver Bonds.—The measure of damages for breach of a contract to deliver bonds of a corporation, the consideration for which has been paid, is the value of the bonds at the time they should have been delivered under the contract with interest, and such value is prima facie their face value.—Henry v. North American Ry. Const. Co., U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 79.

74.——Exemplary Damages.—At common law, what are called exemplary, punitive, or vindictive damages, where the injury has been wanton, malicious, gross, or outrageous, may be awarded by the jury.—Iaeger v. Metcalf, Ariz., 94 Pac. Rep. 1094.

75. **Descent and Distribution**—Conveyance.—Under Rev. St. 1901, par. 1904, the probate court had no power to assign to the assignees of a bankrupt heir the bankrupt's share in a decedent's real estate, where such assignees had not a valid conveyance from the heirs sufficient to pass title to land in Arizona.—In re Delehanty's Estate, Ariz., 95 Pac. Rep. 109.

76. **Dismissal and Nonsuit**—Directing Verdict.—Defendant held entitled to move for dismissal of action, though no demurrer had been filed or request made to direct a verdict, where the court had no jurisdiction because of the death of the wrongdoer.—Hey v. Prime, Mass., 84 N. E. Rep. 141.

77. **Divorce**—Sufficiency of Evidence. — A complaint in divorce that plaintiff's wife habitually and systematically pursued a course of personal indignities towards him, which rendered his condition intolerable, held sustained by the evidence.—Wann v. Wann, Ark., 108 S. W. Rep. 1052.

78. **Dower**—Estoppel.—Where land was purchased from a husband on his wife's assurance that she and her husband had settled their property rights and that she had no further interest in such land, she was estopped from thereafter claiming dower therein.—Morgan v. Sparks, Ky., 108 S. W. Rep. 233.

79. **Ejectment**—Identification of Property.—Where the description in the deeds under which plaintiff claimed corresponded with the description in the declaration, plaintiffs were not bound to introduce a plat of the city subdivision containing the lots to identify the premises.—Glanz v. Ziabek, Ill., 84 N. E. Rep. 36.

80. **Elections** — Contests. — That a man belongs to a church that teaches marriage ceremonies remain in force during this life and all eternity does not disqualify him for an elector, so long as such church does not teach more than one of such marriages for the same person during the same period of time.—Toncray v. Budge, Idaho, 95 Pac. Rep. 26.

81.——Police Power.—The nomination of party candidates for public office concerns the public welfare, and the legislature in the exercise of the police power may make reasonable regulations thereof.—State v. Fulton, Ohio, 84 N. E. Rep. 85.

82. **Eminent Domain**—Collateral Attack.—Where the condemnation judgment in proceedings for the widening and changing the grade of streets is without jurisdiction, the judgment may be collaterally attacked in proceedings to affirm an assessment for the cost of the improvement.—In re City of Seattle, Wash., 94 Pac. Rep. 1075.

83.——Compensation.—The constitutional provision that private property shall not be taken for public use without compensation does not apply to property held by a governmental subdivision for public use.—American Steel Dredge Works v. Board of Com'rs. of Putnam County, Ind., 84 N. E. Rep. 19.

84.——Compensation.—Where a husband and wife have an estate by the entirety in real estate, the wife has a substantial and recognized interest in the inheritance which must be paid for before it can be taken or damaged for public purposes.—Holmes v. Kansas City, Mo., 108 S. W. Rep. 9.

85.——Easements.—The operation and length of trains by an elevated railroad asserting and exercising a right to operate an elevated track held not substantial elements of the right.—Bremer v. Manhattan Ry. Co., N. Y., 84 N. E. Rep. 59.

86. **Equity**—Additional Findings.—Where a reference is made to a master and the master reports findings of fact, the court may make additional findings of fact from the report without hearing further evidence.—American Circular Loom Co. v. Wilson, Mass., 84 N. E. Rep. 133.

87.——Final Decree.—Where the court finds that plaintiff is entitled to an assignment of certain letters patent, it should find the amount to be paid therefor by plaintiff, thus giving it an option, whether to take the patents at the price found.—American Circular Loom Co. v. Wilson, Mass., 84 N. E. Rep. 133.

88. **Evidence**—Copy of Deed.—Where the certified copy of a deed acknowledged before a mayor recited that it bears the mayor's official seal, it will be presumed that the omission of the "(L. S.)" in the copy was the mistake of the recorder making the copy.—Hubbard v. Swofford Bros. Dry Goods Co., Mo., 108 S. W. Rep. 15.

89.——Delay in Transporting Cattle.—In an action to recover for defendant's negligent delay in transporting cattle, witnesses held qualified to state the usual time of transportation between the point of shipment and the market.—St. Louis I. M. & S. Ry. Co. v. Boshear, Tex., 108 S. W. Rep. 1032.

90.——Expert Testimony.—A statement of an expert witness that he believes he is capable of expressing an opinion on the matter in issue is a sufficient expression of his opinion as to his own competency.—El Paso & S. W. Ry. Co. v. Smith, Tex., 108 S. W. Rep. 988.

91.——Recitals in Deeds.—Ordinarily recitals of extraneous facts in a deed are not evidence of the facts stated as against strangers, though binding on the parties and their privies.—Dennis Bros. v. Strunk, Ky., 108 S. W. Rep. 957.

92. **Exceptions, Bill of**—Number of Bills.—Where appellant defendant presented one bill of exceptions, and subsequently plaintiff presented another bill of exceptions, both of which the court signed and made part of the record, they will be treated as supplementary to each other.—United States Benev. Soc. v. Watson, Ind., 84 N. E. Rep. 29.

93. **Executors and Administrators**—Suit to Try Title.—In a suit to try title between grantees of a woman's heirs and grantees of her administrator, a certificate granted by the board of land commissioners held a part of her estate, and subject to administration, and not a donation to her heirs.—Fields v. Burnett, Tex., 108 S. W. Rep. 1048.

94. **Fines**—Power of Court to Remit.—Where a person has been adjudged guilty of contempt by a federal court for willful violation of an injunction order entered in a suit to which he was not a party and a fine has been imposed as a punishment and paid, such fine goes to the United States, and the court, at least after the term has passed, has no jurisdiction to remit the same.—Butte & Boston Consol. Min. Co. v. Montana Ore Purchasing Co., U. S. C. C., D. Mont., 158 Fed. Rep. 131.

95. **Fire Insurance**—Powers of Agent.—To recover for a loss under a policy, by the terms of which liability thereon was suspended for nonpayment of a premium note, on the ground that an agent had continued the policy in force, the agent's authority so to continue the policy must be shown.—American Ins. Co. v. Hornbarger & Harris, Ark., 108 S. W. Rep. 213.

96. **Forgery**—Uttering Forged Note.—In a prosecution for uttering a forged note, the fact that defendant forged the instrument need not be established, but the charge is sustained by proof of an uttering.—State v. Fisk, Ind., 83 N. E. Rep. 995.

97. **Fraud**—Pleading.—The mere characterization of an act in a pleading as having been done "with intent to defraud the plaintiff" does not charge fraud.—Gill v. Manhattan Life Ins. Co., Ariz., 95 Pac. Rep. 89.

98. **Frauds, Statute of**—Parol Gift of Land.—A parol gift of land accompanied by possession and improvements held valid in equity, notwithstanding the statute of frauds.—Hammond v. Hammond, Tex., 108 S. W. Rep. 1024.

99.——Part Performance.—The statute of frauds will not invalidate an oral contract for the sale of an interest in land which has been executed by the delivery and acceptance of the deed, where nothing remains to be done but the payment of money: but, if anything else remains to be done, the statute does apply.—Rogan v. Arnold, Ill., 84 N. E. Rep. 58.

100. **Guaranty**—Bills and Notes.—Whether a guaranty of a note stipulates that the maker will pay or whether it stipulates that the guarantor will pay, the undertaking is absolute, whether the maker is solvent or not, and the guarantor may pay or see that it is paid.—Elgin City Banking Co. v. Hall, Tenn., 108 S. W. Rep. 1068.

101. **Habeas Corpus**—Hearing.—Where a person in custody alleges in his petition for writ of habeas corpus that another court has made an order granting him bail, and the evidence shows no such order ever entered of record, there is a failure to establish such order and the application should be denied.—Ex parte Stevenson, Okl., 94 Pac. Rep. 1071.

102. **Homicide**—Indictment.—An indictment for homicide is not fatally defective because it fails to allege the means or instrument by which the wound was inflicted, or the nature of such wound.—Molina v. Territory, Ariz., 95 Pac. Rep. 102.

103.——Self-Defense.—Where one kills an officer attempting to arrest him without a warrant, and there is nothing from which the official character of the officer can be inferred, the offence is manslaughter.—Hurd v. State, Tenn., 108 S. W. Rep. 1064.

104. **Husband and Wife**—Community Property.—A woman marrying in good faith a man having a wife held entitled to her community interest in property acquired by him subsequent to the marriage.—Hammond v. Hammond, Tex., 108 S. W. Rep. 1024.

105.——Estate by Entirety.—Where a husband and wife have an estate by the entirety in land, the wife may sue for the possession thereof as against all persons except the husband.—Holmes v. Kansas City, Mo., 108 S. W. Rep. 9.

106.——Property of Wife.—The common-law rule that property purchased with the earnings of a wife and children belonging to the husband held inapplicable in a proceeding to set aside exemptions to the husband in bankruptcy from other property.—In re Diamond, U. S. D. C., N. D. Ala., 158 Fed. Rep. 370.

107.——Separate Maintenance.—It was a question for the legislature to declare under what conditions it should accord the right to a married woman to maintain an action for separate maintenance.—Hiner v. Hiner, Cal., 94 Pac. Rep. 1044.

108. **Indictment and Information**—Indorsement of Names of Witnesses.—Objection that the names of some of the witnesses were not indorsed on the indictment held too late when made after final judgment.—State v. Long, Mo., 108 S. W. Rep. 35.

109. **Incest**—Indictment.—The allegation that the crime of adultery and fornication has been committed may be regarded as surplusage not affecting the sufficiency of the facts alleged to charge incest.—McCaskill v. State, Fla., 45 So. Rep. 843.

110. **Interstate Commerce** — Police Power.—Transportation of goods from another state into New Jersey, and delivery in the original packages to the purchasers in that state under a contract of sale, cannot be interfered with by the state or any of its municipalities, except for police purposes.—Simpson-Crawford Co. v. Borough of Atlantic Highlands, U. S. C. C. 158 Fed. Rep. 372.

111. **Limitation of Actions**—Commencement of Action.—Where the service of process in an action is quashed, plaintiff may cause the issuance and service of another summons in the same action on the petition previously filed, or an amended petition, and commence the action anew within Rev. St. 1899, sec. 3461.—Clause v. Columbia Savings & Loan Assn., Wyo., 95 Pac. Rep. 54.

112. **Mines and Minerals**—Notice of Claims.—The object of the law in requiring the location of mining claims to be made with reference to some natural object or permanent monument is to direct attention to the locality in which the claim can be found.—Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co., Idaho, 95 Pac. Rep. 14.

113. **Mortgages**—Assumption by Purchaser.—A general assumption clause in a deed held not to constitute such a contract as to make the case an exception to the general rule that a mortgagee foreclosing against a subsequent grantee maintains his action on the doctrine of subrogation.—Sherman v. Goodwin, Ariz., 95 Pac. Rep. 121.

114.——Payment of Debt.—Where land is conveyed subject to a mortgage and the grantee pays it will extinguish the debt, although he has an assignment made to another.—Lydon v. Campbell, Mass., 84 N. E. Rep. 305.

115. **Municipal Corporations**—Street Improvements.—A contract for street improvements according to specifications, one of which required that all loss or damage arising from the nature of the work to be done should be sustained by the contractor, was void.—Glassell v. O'Dea, Cal., 95 Pac. Rep. 44.

116. **Partnership**—Liability of Partner.—Where a person with his consent has been held out as a partner, liability as such is fastened on him; and an unauthorized holding out will have this effect as a result of a subsequent ratification.—Meinhard, Schaul & Co. v. Bedingfield Mercantile Co., Ga., 61 S. E. Rep. 34.

117.——Realty.—Where a partnership dissolution agreement provided for the payment of partnership debts and adjustment of the rights of partners in the firm assets, held a conversion of partnership real estate into personalty is to be regarded as having been effected.—Rosenbaum v. City of New York, 109 N. Y. Supp. 775.

118. **Patents**—Assignments.—A resolution of corporate stockholders and a formal assignment in accordance therewith held to pass its equitable interest in letters patent to an invention useful in its business but purchased by its president for himself.—American Circular Loom Co. v. Wilson, Mass., 84 N. E. Rep. 133.

119. **Payment**—Presumptions.—Where the presumption of payment of a debt arising by the debtor's executing his note either to the creditor or to a third person deprives the party accepting the note of a collateral security or some other substantial benefit such circumstance rebuts the presumption.—Beach v. Huntsman, Ind., 83 N. E. Rep. 1033.

120.——Replevin.—In an action to replevy horses purchased by plaintiff from defendant's intestate, which plaintiff claimed had been paid for by canceling a debt due him from intestate, evidence of a check drawn by plaintiff in favor of intestate's grandson held admissible as corroborating plaintiff's testimony.—Cobb v. Holloway, Mo., 108 S. W. Rep. 109.

121. **Principal and Agent**—Authority of Agent.—Held, that an express company was liable for the act of an agent in settling a loss in excess of his authority, where his agency was not brought to the attention of the claimant who supposed he was acting as principal.—Brooks v. Shaw, Mass., 84 N. E. Rep. 110.

122.——Liability of Principal.—A manufacturer selling through an agent an alcoholic beverage held liable for the agent's representations that the beverage was nonalcoholic.—Haynor Mfg. Co. v. Davis, N. C., 61 S. E. Rep. 54.

123. **Process**—Defects.—The irregularity or imperfection of a summons or a service thereof which will deprive the court of jurisdiction must render the summons or the service so defective that it will authorize a collateral impeachment of the judgment rendered thereon.—Clause v. Columbia Savings & Loan Assn., Wyo., 95 Pac. Rep. 54.

124. **Railroads**—Accident at Crossing.—A traveler approaching a railroad crossing and the employees in charge of an approaching train held required to exercise the same vigilance to avoid accidents.—Lake Shore & M. S. Ry. Co. v. Brown, Ind., 84 N. E. Rep. 25.

125.——Injuries to Animals.—In an action for killing plaintiff's mare, the giving of an instruction and the refusal of an instruction requested by defendant held error.—Rhinehart v. St. Louis & S. F. R. R. Co., Mo., 108 S. W. Rep. 103.

126.——Injuries to Persons on Track.—Where a person is loitering or standing on a railroad crossing, he may be guilty of negligence, but it cannot be said that the railroad owes him no duty of warning.—Central of Georgia Ry. Co. v. Motz, Ga., 61 S. E. Rep. 1.

127. **Receivers**—Compensation.—The allowance of compensation to a receiver for himself and his attorneys must be made in the first instance by the court appointing the receiver, where the action is pending, and the allowance of that court binds only the parties to the suit.—Berry v. Rood, Mo., 108 S. W. Rep. 22.

128. **Religious Societies**—Ecclesiastical Controversies.—Civil courts have no jurisdiction of ecclesiastical controversies which do not violate civil or property rights.—Fussell v. Hall, Ill., 84 N. E. Rep. 42.

129. **Sales**—Action for Damages.—In an action for breach of a contract to purchase beams to be manufactured, the profit on a sale to another, though made after commencement of the action, should be deducted from the seller's damage.—Isaacs v. Terry & Tench Co., 109 N. Y. Supp. 792.

130.——Breach of Warranty.—Where plaintiff by misrepresentation as to quality sold goods by sample to defendant, who upon discovering the breach of warranty notified plaintiff, held that in an action for the price of the goods defendant could use the breach of warranty as a defense by way of setoff.—Webb & Preston v. Milford Shoe Co., Ky., 108 S. W. Rep 229.

131.——Implied Warranty.—A woolen merchant selling cloth not of his own manufacture to a tailor does not impliedly warrant the qual-

ity or fitness thereof, even as to latent defects. Strauss v. Salzer, 109 N. Y. Supp. 734.

132.——Warranties.—A manufacturer selling a beverage for re-sale held to impliedly warrant that it may be sold without obtaining a liquor license.—Haynor Mfg. Co. v. Davis, N. C., 61 S. E. Rep. 54.

133. **Salvage**—Nature of Service.—There can be no lien for salvage for services rendered to a vessel while in a dry dock, permanently attached to the shore, for repairs, in extinguishing a fire communicated to such vessel from buildings on the land; nor is a suit to enforce a claim for such services within the admiralty jurisdiction.—The Jefferson, U. S. D. C., E. D. Va., 158 Fed. Rep. 358.

134. **Schools and School Districts** — Public Schools.—In a suit to enjoin the issue of bonds to build a school building, even if plaintiff was estopped to question the illegality of a meeting of the district board by having participated therein and having knowledge thereof, such facts were a matter of defense by way of estoppel.—Riggs v. Polk County, Or., 95 Pac. Rep. 5.

135.——Validity of Bonds.—Proceedings for the issuance of school bonds taken by the trustees of a district held not affected by the fact that they cast lots to determine the length of their respective terms, the term of none of them having expired.—McGinnis v. Board of Trustees of Bardstown Gradd School Dis., Ky., 108 S. W. Rep. 289.

136. **Statutes** — Construction. — The words "and" and "or," when used in a statute, are convertible as the sense may require.—People v. Butler, 109 N. Y. Supp. 900.

137.——Construction of Penal Statutes.—Although penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of Congress, and this intention is to be collected from the words employed in the statute.—United States v. Lonabaugh, U. S. D. C., D. Wyo., 158 Fed. Rep. 314.

138. **Subrogation**—Rights of Surety.—Where a creditor has proved his debt in bankruptcy, the surety held entitled to subrogate himself to the creditor's rights on paying the balance due. —Schmitt v. Greenberg, 109 N. Y. Supp. 881.

139. **Taxation**—Liability of Executor.—The executor of a trustee is not liable for taxes on a trust estate held by his testator during the testator's lifetime, but not held or administered on by the executor.—State v. Valley Trust Co., Mo., 108 S. W. Rep. 97.

140.——National Banks. — The cashier of a national bank as agent of the bank has no authority to list the capital stock for assessment against the bank, and the mistake of the cashier in so listing the capital stock will not estop the bank from recovering the taxes paid under protest on such void assessment.—Weiser Nat. Bank v. Jeffreys, Idaho, 95 Pac. Rep. 23.

141.——Tax Deeds.—The recording of a valid tax title is notice that the grantee therein disclaims a tenancy under a lease of the premises, and an action against him must be brought within two years.—Hudson v. Schumpert, S. C., 61 S. E. Rep. 104.

142. **Towns**—Public Debt.—A township advisory board has no power to make an appropriation, unless there are funds available for that purpose or create any indebtedness in excess of the debt limit fixed by Const. art. 13, sec. 1. —State v. Johns, Ind., 84 N. E. Rep. 1.

143. **Trespass to Try Title**—Burden of Proof. —In trespass to try title, where plaintiffs claimed an equity as against the legal title in defendants, the burden was on the plaintiffs to show that the defendants were not bona fide purchasers.—Wallis, Landes & Co. v. Dehart, Tex., 108 S. W. Rep. 180.

144. **Trial**—Directing Verdict.—Where plaintiff fails to state a case upon his opening, presiding judge is authorized to order a verdict for defendant at once, or to wait until the plaintiff's evidence or the entire evidence has been introduced before doing so.—Hey v. Prime, Mass., 84 N. E. Rep. 141.

145.——Direction of Verdict.—It is improper to peremptorily instruct for plaintiff in any cause where his prima facie case is not admitted, or where it is admitted, if defendant has introduced evidence which tends to disprove it. —Reynolds v. Hood, Mo., 108 S. W. Rep. 86.

146.——Evidence.—A general manager of a corporation may not testify as to what the nature of his duties are, where the by-laws of the corporation prescribe such duties, since the by-laws are the best evidence.—Green v. Hereford, Ariz., 95 Pac. Rep. 105.

147.——Instructions.—Abstract propositions of law in instructions when not pertinent and necessary to the case as made tend rather to confuse than aid the jury, and it is the better practice to reduce the issue of fact to as limited a compass as is consistent with full instructions. —Salmon v. Helena Box Co., U. S. C. C. of App., Eighth Circuit, 158 Fed. Rep. 300.

148.——Peremptory Instructions.—It was error to grant a peremptory instruction for defendant in an action for damages for destruction of property by fire, where there was evidence that the fire was set out by defendant's servant.—Gibson v. W. C. Wood Lumber Co., Miss., 45 So. Rep. 834.

149. **Trover and Conversion**—Damages.—In estimating the value of personalty converted plaintiff may recover the highest amount which he can prove between the time of conversion and trial.—Walton v. Henderson, Ga., 61 S. E. Rep. 28.

150. **Trusts**—Creation of Trust.—Whether words and acts of an alleged trustor indicate with reasonable certainty an intention to create a trust, and the subject, purpose, and beneficiary of the trust, is a question of fact.—Noble v. Learned, Cal., 94 Pac. Rep. 1047.

151.——Enforcement.—Where two stockholders deposited their stock with another under an agreement that the stock should be sold for the benefit of the corporation, both stockholders were necessary parties to an action based on the violation of the agreement.—Parmenter v. Homans, 109 N. Y. Supp. 800.

152. **United States** — Indian Commissions.— The disbursing officer of an Indian Treaty Commission held required to account to the government for payments made to one of the commissioners for subsistence and for salary paid to him while he was absent from the field on leave.—United States v. Hoyt, U. S. C. C., E. D. Wash., 158 Fed. Rep. 162.

153. **Vendor and Purchaser**—Bond to Convey. —A bond for title executed by a trustee under which the obligee went into possession held sufficient to vest the equitable title in the obligee sufficient to sustain a subsequent conveyance of the legal title as against a judgment creditor of the beneficiary.—Oder v. Jump, Ky., 108 S. W. Rep. 292.